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**IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF NEVADA**

COMMODITY FUTURES TRADING
 COMMISSION,

Plaintiff,

vs.

DAVID GILBERT SAFFRON, et al.,

Defendants.

**REPLY IN SUPPORT OF MOTION TO
 QUASH SUBPOENA**

Case No. 2:19-cv-1697-JAD-DJA

INTRODUCTION

This case presents a challenge for third-party J. Damien Scott (“*Scott*”). Scott’s previous employer Bedrock Protection Agency (“*BPA*”) is a victim of the crimes of Mr. Saffron, having provided hundreds of thousands of dollars of personal security services to him over and above those for which Mr. Saffron paid. While at one time, Scott believed that Mr. Saffron was a wealthy individual, under legitimate threat and in need of security protection, Scott has realized that Mr. Saffron was never what he appeared to be. Nevertheless, while Scott supports the prosecution of Mr. Saffron, Scott believes in his rights to personal privacy; including those rights enshrined in the Right to Financial Privacy Act (“*RFPA*”). These rights include the freedom from having agents of the Commodity Futures Trading Commission (“*CFTC*”) perusing Scott’s personal financial records unrelated to Mr. Saffron.

1 Since the CFTC did not comply (substantially or otherwise) with the requirements of
 2 RFPFA, and since the records sought bear no relation to the law enforcement inquiry set forth in
 3 the CFTC's opposition to the instant Motion, Scott asks this Court to quash the subpoena or at
 4 least limit it to transactions between Scott and accounts the CFTC can identify in advance of the
 5 issuance of a revised subpoena as belonging to the Defendants in this action.
 6

7 **ARGUMENT**

8 The CFTC pays short shrift to the RFPFA, both in the notice and in the opposition. The
 9 gist of the opposition is that the subpoena complies with Rule 45; however, the gist of the Motion
 10 is that the subpoena violates RFPFA. Scott does not contend that it will be burdensome for him to
 11 personally copy these records, or that the CFTC failed to comply with the requirements of Rule
 12 45. He contends that the discovery sought will burden his right to financial privacy as protected
 13 under RFPFA without the required notice including the specific purpose for the records.
 14

15 RFPFA requires the government to articulate a "reason to believe that the records sought
 16 are relevant to a legitimate law enforcement inquiry . . ." 12 U.S.C.A. § 3407(1). A customer
 17 may move to quash a subpoena on the grounds that the "financial records sought are *not relevant*
 18 to the legitimate law enforcement inquiry stated by the Government authority in its notice . . ."
 19 12 U.S.C. § 3410(a) (Emphasis added). As no purpose was stated by the CFTC in its notice, the
 20 subpoena must be quashed.
 21

22 **A. The Law Enforcement Inquiry Basis of the Subpoena and Notice.**

23 The Subpoena and notice to Scott contain no information about the law enforcement
 24 inquiry into Scott's records. The RFPFA requires the service of a notice "which shall state with
 25 reasonable specificity the nature of the law enforcement inquiry." [12 USCA § 3407(2).] The
 26 CFTC provided a notice that references the sections of United States Code that the Defendants
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are alleged to have violated. [See Motion, Ex. 1, p. 11.] No information is provided as to why the CFTC believes that information about the Defendants' violations will be evidenced by Scott's records.

The CFTC asserts that a generic reference to the code sections allegedly violated by Mr. Saffron constitutes "substantial compliance," citing an unpublished case from the Central District of California. In the absence of binding precedent on this Court, this Court should undertake to interpret this statute itself in the first instance. " 'When determining statutory meaning, we look first to the plain meaning of the text.' [Citation.]¹ '[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.' [Citation.]² " *Transwestern Pipeline Co., LLC v. 17.19 Acres of Prop. Located in Maricopa Cty.*, 627 F.3d 1268, 1270 (9th Cir. 2010).

The deficiency in the notice is clear when the Court views the notice itself (page 11 to Ex. 1 of the Motion) with the statutory text. That text provides a subpoena may be issued

only if ... (2) a copy of the subpoena has been served upon the customer ... together with the following notice which shall state with reasonable specificity the nature of the law enforcement inquiry:

"Records or information concerning your transactions which are held by the financial institution named in the attached subpoena are being sought by this (agency or department or authority) in accordance with the Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.] **for the following purpose:** If you desire that such records or information not be made available, you must...

12 U.S.C. §3407 (emphasis added).

¹ *Paul Revere Ins. Grp. v. United States*, 500 F.3d 957, 962 (9th Cir.2007).

² *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979).

1 Mr. Scott offers to the Court that “specificity” about the “nature of the law enforcement
2 inquiry,” requires some amount of disclosure about the connection between the charged offense
3 and the records the CFTC seeks by the subpoena. That a purpose for the records sought must be
4 included in the notice is supported by the text of the statute providing for the notice. That text
5 requires the CFTC to state the records “are being sought ... for the following purpose:” [Id.] The
6 notice provided by the CFTC not only omits the purpose for the subpoena, but it also omits the
7 required language, “for the following purpose:”.

9 Instead, the notice reads “On September 30, 2019, the Commission instituted filed suit
10 [lists Court and caption of suit.] The Commission has charged the defendants in these
11 proceedings with violations of [lists federal statutes and regulations]. ... the attached subpoena
12 has been issued by the CFTC in that proceeding to assist in determining whether the alleged
13 violations occurred.” [See Motion, Ex. 1, p. 11.] This generalized statement of purpose, if
14 sufficient, would support any subpoena concerning any records about person. Such a *pro forma*
15 statement could not constitute a disclosure of the purpose. Where no purpose is disclosed in the
16 notice, the CFTC cannot have fulfilled the requirements of RFPFA, including the requirement of
17 stating with reasonable specificity the nature of the law enforcement inquiry. As it violates
18 RFPFA, this Court should quash the subpoena on that basis.

21 **B. The CFTC’s Purpose Disclosed in the Opposition Does Not Support the**
22 **Subpoena as Drafted.**
23

24 In its opposition, but not its notice, the CFTC asserts the law enforcement purpose of its
25 subpoena. Had this been disclosed up front as required by RFPFA, these issues would have been
26 addressed in the Motion and not in this reply. CFTC asserts its purposes for these records include
27 “that Scott may be, or has been, accepting, holding, and/or dispersing customer funds or other
28

1 assets on behalf of Saffron and in violation of the Court’s previous orders.” [Opposition at p. 3.]
2 Furthermore, “[t]he only way that the CFTC can determine where the money came from to
3 purchase the digital assets in Scott’s Gemini account is to review Scott’s personal bank records.”
4 [Opposition at p. 4.] Additionally, “Scott’s spouse, Susan Scott, is also closely associated with
5 Saffron.” [Id.] Finally, “that Scott and his wife may be handling Saffron’s finances through the
6 Bedrock entities and acting as pass-throughs on behalf of Saffron.” [Id.] The CFTC explains this
7 “Subpoena directed to Scott is reasonably calculated to determine if Scott has sent or received
8 any funds from Saffron, or Saffron business entities, during the time period identified in the
9 CFTC’s complaint.” [Id. at p. 4-5.]
10
11

12 In sum, the CFTC seeks Scott’s records because: i) it wants to enforce a TRO issued by
13 this Court; ii) it wants to determine where the money came from to purchase digital assets in
14 Scott’s alleged Gemini account; iii) it suspects Scott’s wife of association with Mr. Saffron; and
15 iv) it believes Scott and his wife are handling Mr. Saffron’s finances. These claims do not support
16 the subpoena.
17

18 The TRO was issued by this Court on October 3, 2019, ordering an asset freeze and the
19 disclosure of Defendants’ records. [Dkt. #9.] This does not justify seeking Scott’s records prior
20 to that date, nor does it justify seeking Scott’s records other than of transfers to or from
21 Defendants or their accounts (if any). It does justify seeking *Defendants’ records* from their
22 financial institutions.
23

24 The CFTC asserts it wishes to know the source of funds used by Scott to purchase assets
25 in a Gemini account. Unless those funds came from the Defendants (in which case a subpoena
26 for *Defendants’ records* would disclose any transfer to Scott) the CFTC offers no reason why
27 Scott’s alleged purchase of digital assets would relate to Mr. Saffron’s alleged criminal activity.
28

1 The CFTC asserts some suspicion towards Scott's wife. While this strikes Scott as
2 unjustified, it is not a reason to seek Scott's records.

3 Finally, if the CFTC believes that Scott and his wife are handling Defendants' assets, it
4 must know from what source these assets were derived. Scott would accept a limited subpoena
5 that identifies these sources and asks the bank to produce records showing transactions with
6 those source accounts. It does not justify a look at Scott's entire financial history.
7

8 **C. The CFTC Supports its Claims with Illegible, Comingled, and Missing**
9 **Evidence.**

10 The CFTC presents a declaration of one of its agents, Mr. Malas. [(**"Malas Dec."**), Dkt.
11 #87-1.] The declaration cites to various websites, registrations, and other generic information
12 about Mr. Scott as well as entities not related to this Motion such as Bedrock Protection Agency
13 and Bedrock Special Projects Group. [See Malas Dec., ¶ 4a-c.] It also addresses information
14 about non-party Kinetic Marketing Systems, Inc. [See Malas Dec., ¶ 4d.] The Malas Declaration
15 and the opposition make much of an alleged account with Gemini in the name of Scott, which is
16 purported to be evidenced by exhibit F to the opposition. [See Malas Dec., ¶ 4f.] In addition, the
17 Malas Declaration and the Opposition rely on excerpts of the transcript of Preston Sterling Kerr.
18 [See Malas Dec, ¶ 4j.]

19 To be clear, this Motion is brought on behalf of Scott only, not Kinetic Marketing
20 Systems, Inc., BPA, or Bedrock Special Projects Group (**"BSPG"**). Any involvement of these
21 entities would be reflected in *their records*, not those of Scott, and thus there is no reason for
22 their inclusion in the opposition. The relevance of any suspicions cast at those entities (whether
23 or not merited by evidence, none of which is disclosed) is unclear to this Motion. If the CFTC
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1 seeks Scott's records, it should show the purpose it needs Scott's records, not the purpose it seeks
2 someone else's records.

3 Several paragraphs in the Malas Dec. and several references in the Opposition point this
4 Court to Exhibit F, the supposed records of Scott's digital asset account. [See Opposition, p. 4
5 (referencing pages 8 and 15), Malas Dec., ¶ 4h, 6, 13a (referencing pages 7-8).] Pages 7 and 15
6 of the document are illegible. [See Dkt. 87-7.] Page 8 is barely legible but does not appear to
7 mention Scott. [Id.] Scott cannot respond to this evidence as it is presented in an illegible format.
8

9 Additionally, there are references to the testimony of Mr. Kerr. [See Opposition at p. 4.]
10 Mr. Kerr's transcript is not attached. Instead, Mr. Malas has testified as to its contents. [See
11 Malas Dec., ¶ 7.] This is inadmissible hearsay, even if considered as a proffer of what Mr. Malas
12 would testify to in a live hearing, because these are statements of Mr. Malas offered to show
13 what Mr. Kerr asserts. The CFTC would need to support these arguments with the transcript of
14 Mr. Kerr's testimony.
15

16 CONCLUSION

17 For the foregoing reasons, Mr. Scott respectfully requests that this Court quash the
18 subpoena duces tecum issued to JP Morgan Chase Bank as to his records. In the alternative, the
19 Subpoena should be limited to documents relevant to transactions between Scott and other
20 accounts the CFTC can identify, in advance, as being relevant to this case. Lastly, Scott
21 respectfully requests this Court award reasonable attorney's fees.
22

23 DATED on this 14th day of December 2020.
24

25
26 PIA HOYT, LLC

27 /s/ William O. Kimball
28 William O. Kimball

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December, 2020, I filed the foregoing Reply in Support of Motion to Quash Subpoena with the Clerk of the Court using the CM/ECF system which will serve notice to all counsel of record.

Additionally, a certified mail a copy of this motion and the attached sworn statement, has been mailed to the Commodity Futures Trading Commission, Division of Enforcement, Attention: Danielle Karst, Trial Attorney, 1155 21st Street N.W., Washington, D.C. 20581.

/s/Stephanie Hamilton
Paralegal